

FINAL STATEMENT OF REASONS

The Initial Statement of Reasons is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS

On August 24, 2012, the California Department of Corrections and Rehabilitation (CDCR) submitted a request to the Office of Administrative Law (OAL) for the Emergency adoption of these regulations concerning the Alternative Custody Program (ACP). This request was approved by OAL and became effective on September 13, 2012.

The Notice of Proposed Regulations was published on October 12, 2012, which began the public comment period. The Department's Notice of Change to Regulations (NCR) #12-08 was mailed the same day in addition to being posted on the CDCR internet and intranet websites. The public hearing was held on November 30, 2012, which was the final day of the public comment period. At the public hearing, no one commented.

During the 45-day public comment period, 13 written comments were received. Commenters 1 through 5 are summarized and responded to below under "Summaries and Responses to Written Public Comments." Commenters 6 through 13 are not specifically related to the adoption of these regulations. These comments are included in the rulemaking file but are not summarized or responded to.

FORMS

The following forms were referred to throughout the proposed regulation text (CDC 115, CDC 115-A, CDC 115-C, CDC 128-B, CDC 128-G, CDCR 1502, CDCR 1516-ACP, CDCR 2234, and CDCR 2235). These forms were made available to the public throughout the rulemaking process, and will continue to be made available upon request. However, to publish these forms into the California Code of Regulations would be cumbersome and impractical, and would increase costs to the Department.

CHANGES TO THE FINAL TEXT OF EMERGENCY REGULATIONS

There were no changes to the originally-approved emergency text that was presented to the public on October 12, 2012 in both the Notice of Emergency Regulations and NCR #12-08.

DETERMINATION

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective as and less burdensome to affected private persons than the adopted regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department is required to adopt these regulations in order to implement, interpret and make specific the Alternative Custody Program under Penal Code Section 1170.05.

The Department has determined that no reasonable alternatives to the regulation have been identified or brought to the attention of the Department. Additionally, there has been no testimony or other evidence provided that would alter the Department's determination.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561. The Department has determined that the proposed action will have no significant effect on housing costs. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

PUBLIC HEARING COMMENTS

Public Hearing - November 30, 2012, at 9:00 a.m.

No one commented at the public hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

COMMENTS #1

Comment 1: Commenter expresses a concern regarding the exclusive eligibility for participation in the ACP, and the fact that it is available only to female prisoners. Commenter shares information about his past experience with participation in programs such as the Community Correctional Re-entry Facility Program (CCRF). It is the commenter's personal opinion that programs such as CCRF and ACP contribute positively to an inmate's success/re-integration into society. Commenter requests an explanation regarding the reason ACP does not include male prisoners.

Accommodation: None.

Response 1: California Penal Code (PC) Section 1170.05(c) as amended by Senate Bill (SB) 1021 (2012) states, "...female inmates sentenced to state prison for a determinate term of imprisonment pursuant to Section 1170, and only those persons, shall be eligible to participate in the Alternative Custody Program authorized by this section." Therefore, male inmates are not eligible, by state statute, to participate in ACP.

COMMENTS #2

Comment 2: Commenter provides personal information about himself, and states that he is currently serving time in a fire camp. Commenter explains that he has done a thorough review of the NCR regarding the ACP, and in his opinion he is qualified for the Program. Commenter requests approval to enter into the ACP.

Commenter further states that Title 15, Section 3004(a) through (c), the California Constitution, and California State law prohibits discrimination against any citizen and/or inmate based on gender.

Accommodation: None.

Response 2: See Commenter # 1, Response 1.

COMMENTER #3

Comment 3: Commenter states that the proposed regulations violate the equal protection clause of the 14th Amendment due to gender discrimination. The commenter cites several legal cases regarding discrimination. Commenter also states that Title IX of the Education Amendments of 1972 (20 U.S.C. §1681(a)) requires CDCR to allow male inmates to participate in the Alternative Custody Program. The commenter includes quotations from federal case law interpreting that statute, including *Roubideaux v. North Dakota Dep't of Corrections and Rehabilitation*, 570 F.3d 966, 976-66 (8th Cir. 2009), applying Title IX's requirements to prisons, and *Jeldness v. Pearce*, 30 F.3d 1220,1224-25 (9th. Cir. 1994), requiring that merit pay must be given to both men and women in vocational programs.

Accommodation: None.

Response 3: See Commenter # 1, Response 1. Title IX applies only to an educational program or activity. (See 20 U.S.C. §1681(a). See also [*Women Prisoners of D.C. Dep't of Corr. v. Dist. of Columbia*, 93 F.3d 910, 927 \(D.C.Cir.1996\)](#) (“But even though we do not address the scope of Title IX in the prison context, we admit to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of *educational* opportunities with which Title IX is concerned.”), cert. denied, [*520 U.S. 1196*, *117 S.Ct. 1552*, *137 L.Ed.2d 701* \(1997\)](#); *Robideaux*, p. 977-78, stating that a “prison industries” program was primarily a work or employment program, not an educational program and therefore not subject to Title IX.). The *Jeldness* case cited by the commenter involves a vocational education program and merit pay in that program, and thus involves an educational program. In contrast, the Alternative Custody Program allows inmates to serve their sentence in the community rather than in prison and CDCR provides no educational program or activity to Alternative Custody Program participants. Thus, the Alternative Custody Program is not an educational program or activity and is not subject to Title IX requirements.

COMMENTER #4

Comment 4: Commenter references CDCR Form 2234 (ACP Application and Voluntary Agreement). Commenter asserts that removal of the eligibility criteria language which specifies that an inmate must have been a primary caregiver of a dependent child immediately prior to incarceration, is discriminatory and a violation of male inmates' rights that may have previously fit these criteria. It is the commenter's opinion that the above-mentioned language should be reinstated onto the form.

Accommodation: None.

Response 4: California PC Section 1170.05(c) as amended by SB 1021 (2012) states, “...female inmates sentenced to state prison for a determinate term of imprisonment pursuant to Section 1170, and only those persons, shall be eligible to participate in the Alternative Custody Program authorized by this section.” CDCR has no authority to expand eligibility beyond what the statute permits.

COMMENTER #5

Comment 5A: Commenter references proposed regulation language in Section 3000 and 3078.2. Commenter states that these sections violate the California Constitution by excluding all male prisoners from the ACP. It is the commenter's opinion that CDCR has failed to provide justification for the exclusion of male prisoners from participation in the ACP. Commenter suggests that Sections 3000 and 3078.2 be revised, removing any reference to gender as a prerequisite for ACP eligibility.

Accommodation: None.

Response 5A: California PC Section 1170.05(c) as amended by SB 1021 (2012) states, "...female inmates sentenced to state prison for a determinate term of imprisonment pursuant to Section 1170, and only those persons, shall be eligible to participate in the Alternative Custody Program authorized by this section." CDCR is not permitted to expand the scope of a governing statute when promulgating regulations. Furthermore, CDCR is legally permitted to treat male and female inmates differently if they are not "similarly situated." *Woods v. Horton*, 167 Cal.App. 4th 658, 671 (2008). The finding of the Legislature as set forth in SB 1266 enacting ACP serve as evidence that male and female inmates are not "similarly situated" for the purposes of ACP. Therefore, male inmates are statutorily ineligible to participate in ACP.

Comment 5B: Commenter references the proposed exclusionary criteria language in Section 3078.3(b)(2). Commenter states that this proposed language violates the Americans with Disabilities Act (ADA) because it allows prison officials to exclude prisoners with current psychiatric or medical conditions who require ongoing care. Commenter gives their opinion that, because the State is responsible for providing health care to individuals in the ACP, there is no rational basis to exclude prisoners with medical and psychiatric conditions. Commenter is suggesting that the exclusionary criteria language be modified, so that prisoners with medical and psychiatric conditions are not unlawfully excluded from the ACP.

Accommodation: None.

Response 5B: Under proposed Section 3078.3(b), whether to exclude an inmate with "current psychiatric or medical conditions that require ongoing care," is to be considered on a case-by-case basis. The purpose of this subsection is to allow individualized evaluation of each inmate's psychiatric or medical condition by a staff physician or psychiatrist. This will include review of the likelihood that the inmate's placement in the community will not disrupt necessary ongoing care and will not cause an adverse effect on the inmate or other persons if the inmate is placed in ACP. Because participation is based on an individualized determination by clinicians of the inmate's ability to participate in the program based on individual health factors, the regulation does not exclude all prisoners with medical and psychiatric conditions and does not violate the Americans with Disabilities Act.

Comment 5C: Commenter references the proposed regulation language in Sections 3078.4(a-c). Commenter states that this proposed language should be modified to include specific time frames for completion of screening, assessment, a treatment plan, placement identification, and the classification procedures involved in ACP placement. It is the commenter's opinion that without such required timeframes, prisoners will likely suffer unreasonably long delays in the ACP approval process.

Accommodation: None.

Response 5C: Identification of specific completion timeframes for each step in the ACP process is not feasible, as there are too many extenuating factors; dependency on outside entities/law enforcement agencies to provide information needed; and each step is reliant upon the previous step which could

impact such timeframes. The practice of not identifying specific completion timeframes is consistent with the regulations for all other CDCR program transfers, as steps are not given timeframes to be completed by.

A training module has been developed to guide staff on the application process and operational aspects of the program including suggested time frames for the steps involved. Additionally, staff training, via webinars and town hall meetings with both staff and inmates at the female prisons is conducted on a continuous basis to ensure clarity on the application process. An ACP help line and an email contact were established to assist with answering questions about ACP from staff as well as the public. A designated staff member has been assigned at each institution to track and ensure the application process is being completed in a timely manner. The training module, staff training, town hall meetings, help line, email contact and assigned staff were initiated to ensure assistance is available to staff and inmates so that each step of the application process will be completed in a timely manner.

COMMENTS #6 through #13

Commenters #6 through #13 are from inmates requesting to be included in the ACP.

Accommodation: None.

Response: Since the comments are not specifically related to the adoption of these regulations, no summary or response is required pursuant to the Administrative Procedures Act.